

Before the
Administrative Hearing Commission
State of Missouri



DIRECTOR OF DEPARTMENT
OF PUBLIC SAFETY,

Petitioner,

vs.

WILLIAM M. WHITE,

Respondent.

No. 13-1722 PO

DECISION

William M. White is subject to discipline because he committed the criminal offenses of making false representations to the Missouri Division of Employment Security (the "Division"), and stealing.

Procedure

On October 1, 2013, the Director of Public Safety ("Director") filed a complaint seeking to discipline White's peace officer license. White was personally served with the complaint and our notice of complaint/notice of hearing on January 8, 2014. White did not file an answer, and on April 15, 2014, the Director filed a motion for summary decision. On April 16, 2014, we advised White that the Director had filed the motion and gave him until April 30, 2014 to respond, but he did not respond. On May 14, 2014, we denied the motion for summary decision.

On June 10, 2014, we convened a hearing. White did not appear in person or by counsel. The Director was represented by Assistant Attorney General Ron Dreisilker.

The case became ready for our decision on July 17, 2014, the date the last written argument was due. On July 23, 2014, White submitted an order of expungement and an order that his case be sealed, both entered in the Circuit Court of St. Charles County.

Findings of Fact

1. White holds peace officer license number 29738, which was issued by the Director on June 29, 2006, and has remained current and active since then.

2. On June 17, 2010, White began claiming and receiving unemployment benefits because he was unable to find work, and he had not obtained employment since returning from active duty in the U.S. Army two months earlier.

3. In August 2010, White secured part-time employment as a police officer with the City of Wellston. He was paid \$11.96 per hour and worked from 16 to 32 hours per week.

4. White was providing for himself, his wife, and his three young children at all relevant times.

5. From the week ending August 14, 2010 through the week ending August 21, 2010, and from the week ending May 21, 2011, through the week ending August 25, 2012, White underreported his earnings to the Division (usually by about 30 to 50%) when requesting his weekly benefits so he would receive more unemployment compensation than he was actually due.¹ Thus, the Division paid him \$14,359.00 more than he was eligible to receive.

¹ Persons who are employed on a part-time basis may still be eligible to receive unemployment compensation, provided they meet certain eligibility guidelines based upon their weekly earnings from such employment and provided they keep searching for a full-time position as they receive benefits. *See* §288.030(28)(b) and 288.040.1(4). Statutory references are to the RSMo Supp. 2013 unless otherwise noted.

6. At all relevant times, White's unemployment benefits were direct deposited into his bank account.

7. The Division sent notice to White that it was conducting an audit of his payroll records to determine if he had been overpaid. After the audit, it sent him a second notice stating the amount of the overpayment.²

8. On September 24, 2012, White began working full time as a police officer for the Village of Bel-Nor.

9. On September 25, 2012, White contacted the Division and established a plan for repayment of the amounts he had been overpaid at the rate of \$100 per month, beginning in October 2012.

10. On February 19, 2013, the Division sent an investigator to White's home to conduct a recorded interview, during which White expressed several times that he was making a serious effort to repay the extra benefits he had received, and stated he had no intention of shirking his responsibility to repay the Division.

11. During the interview, the investigator suggested to White that if he made immediate restitution of the balance he owed the Division (over \$14,000 at that time), White could probably avoid criminal prosecution for the underreporting/ overpayment, but White stated he was unable to pay the balance immediately.

12. The Division referred the matter to the Prosecuting Attorney of St. Charles County.

13. On April 30, 2013, the Prosecuting Attorney of St. Charles County informed the Division's Claims Supervisor that a deferred prosecution agreement had been reached

² Division Investigator Michael Kauflin testified as to the notices that were sent (Tr. 29), but he did not specify the dates they were mailed to White and no copies were placed in the record.

with White, and the Prosecutor tendered a check for the full balance of White's repayment amount: \$13,561.35.

14. The Director filed his complaint seeking to discipline White's license as a peace officer on October 1, 2013.

15. On October 24, 2013, White filed a petition in the Circuit Court of St. Charles County to expunge his arrest record relative to the referral to the St. Charles County Prosecutor.

16. On January 17, 2014, the Circuit Court of St. Charles County issued a Judgment and Order of Expungement granting White's petition for expungement of his arrest records pursuant to §§ 610.122 and 610.123, RSMo 2000.

Conclusions of Law

We have jurisdiction to decide this case. Section 590.080.2. The Director has the burden to prove, by a preponderance of the evidence, that White committed an act for which the law allows discipline. *See, Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-230 (Mo. App. W.D. 2012) (dental licensing board demonstrates "cause" to discipline by showing preponderance of evidence). A preponderance of the evidence is evidence showing, as a whole, that "the fact to be proved [is] more probable than not." *Id.* at 230 (*quoting State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D. 2000)).

The Director is responsible for issuing and disciplining the licenses of Missouri peace officers. Sections 590.020, .030, and .080. The Director alleges there is cause for discipline of White's peace officer license under § 590.080, which states:

1. The director shall have cause to discipline any peace officer licensee who:

* * *

(2) Has committed any criminal offense, whether or not a criminal charge has been filed[.]

Section 556.016, RSMo 2000, defines a criminal offense as follows:

1. An offense defined by this code or by any other statute of this state, for which a sentence of death or imprisonment is authorized, constitutes a “**crime**”. Crimes are classified as felonies and misdemeanors.

The crimes that the Director alleges were committed by White were violations of § 288.380.3 (making a false statement to the Division) and § 570.030.1 (stealing).

Section 288.380 states:

3. No person shall make a false statement or representation knowing it to be false or knowingly fail to disclose a material fact, to obtain or increase any benefit or other payment pursuant to this chapter, or under an employment security law of any other state or of the federal government either for himself or herself or for any other person.

* * *

7. Any person who shall willfully violate any provision of this chapter, or of any employment security law of any other state or of the federal government or any rule or regulation, the observance of which is required under the terms of any one of such laws, shall upon conviction be deemed guilty of a misdemeanor and shall be punished by a fine of not less than fifty dollars nor more than one thousand dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment, and each such violation or each day such violation continues shall be deemed a separate offense.

White did not participate in the hearing of the Director’s complaint alleging cause to discipline his license. The only submissions White has made are copies of the Judgment and Order of Expungement, which verify to us that the Circuit Court of St. Charles County ordered the destruction of White’s arrest records. Viewed generously, we interpret these submissions as an argument on White’s part that whatever offenses he might have committed should have no legal effect on this proceeding.

In the Judgment and Order of Expungement, we find no indication of the offense with which White was charged, although we have evidence he was charged with some crime because White enclosed a memorandum of Nolle Prosequi in cause number 1311-CR02190 in response to the Director's request for admissions.³ The memorandum was filed in the Circuit Court of St. Charles County, by an Assistant Prosecuting Attorney, on April 29, 2013. The day after the memorandum was filed with the Court, the Division received the balance of White's restitution from the office of the Prosecuting Attorney and was advised that White had entered a deferred prosecution agreement.

The Judgment of Expungement recites that it was entered pursuant to §§ 610.122⁴ and 610.123. Section 610.122 provides:

Arrest record expunged, requirements.

Notwithstanding other provisions of law to the contrary, any record of arrest recorded pursuant to section 43.503, RSMo, may be expunged if the court determines that the arrest was based on false information and the following conditions exist:

- (1) There is no probable cause, at the time of the action to expunge, to believe that the individual committed the offense;
- (2) No charges will be pursued as a result of the arrest;
- (3) The subject of the arrest has no prior or subsequent misdemeanor or felony convictions;
- (4) The subject of the arrest did not receive a suspended imposition of sentence for the offense for which the arrest was made or for any offense related to the arrest; and
- (5) No civil action is pending relating to the arrest or the records sought to be expunged.

Section 610.123 states:

1. Any person who wishes to have a record of arrest expunged pursuant to section 610.122 may file a verified petition for expungement in the civil division of the circuit court in the county of the arrest[.]

³ The documents White tendered to the Director in response to his request for admissions were appended to the Director's motion for summary decision and marked as Exhibit C thereto.

⁴ RSMo 2000.

2. The petition shall name as defendants all law enforcement agencies, courts, prosecuting attorneys, central state depositories of criminal records or others who the petitioner has reason to believe may possess the records subject to expungement. **The court's order shall not affect any person or entity not named as a defendant in the action.**

(Emphasis added.)

The Director asserts that the Judgment of Expungement is not binding upon the Director or this Commission in determining whether White committed a criminal offense. We agree, based upon the plain language of § 610.123.2.

On May 14, 2014, we denied the Director's motion for summary decision because § 610.122(1) provides that an arrest record may be expunged only if the court determines, among other facts, that "There is no probable cause, at the time of the action to expunge, to believe the individual committed the offense." But in his written argument, the Director not only points to the language of § 610.123.2, but also argues that he is not collaterally estopped from proving that White committed the underlying offense. The Director points out that collateral estoppel may only be applied after an analysis of four factors:

(1) whether the issue decided in the prior case was identical; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) whether the party sought to be estopped had a full and clear opportunity to litigate the issue in the prior suit.

Burton v. State, 726 S.W.2d 497, 499 (Mo. App. E.D. 1987).

As noted above, the copies of court documents submitted by White do not provide us with sufficient detail to know what underlying offense the Court found there was no longer probable cause to believe White committed, so collateral estoppel is foreclosed

based on the lack of identity of the issue decided. Moreover, virtually paralleling the plain language of § 610.123.2 and the logic behind it, the party against whom collateral estoppel would be asserted was not a party or in privity with a party to the prior adjudication and could not therefore have had a full opportunity to litigate the issue. The doctrine of collateral estoppel does not apply based on our analysis of the first, third, and fourth factors listed above. *Id.* Thus, neither the statute under which White's petition for expungement was granted, nor the doctrine of collateral estoppel, can prevent the Director from proving that White committed a criminal offense.

The statute under which the Director alleges he has cause to discipline White's license depends in no way upon whether or not White was ever arrested for the criminal offense he committed. In fact, the provision authorizing discipline states cause exists, whether or not the crime is ever charged. Since it is the illegal conduct and not the filing of charges, and not, by extension, the records of arrest, which is the basis for disciplinary action, we agree that cause for discipline may exist regardless of any subsequent expungement of the associated arrest. *Cf. Schumer v. Lee*, 404 S.W.3d 443, 447 n.3 (Mo. App. W.D., 2013) (even a substantive acquittal in a criminal prosecution is irrelevant to discipline proceeding in which administrative tribunal is determining whether a crime was committed).

As evidence in this case, the Director relied exclusively on the Division's investigation. Despite not having copies of the charging documents or the docket sheet from the abandoned criminal prosecution, we conclude there is a preponderance of the evidence, including in White's own taped interview, that he committed the underlying offense of intentionally underreporting his earnings from his part-time work for the City

of Wellston so he could receive extra unemployment compensation. Thus, White violated § 288.380.3.

The Director also alleges that White committed the crime of stealing, in violation of § 570.030.1, which states:

A person commits the crime of stealing if he or she appropriates property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion.

By his repeated behavior of calling or contacting the Division by electronic means and knowingly providing false information about the amount of money he was being paid for working at the City of Wellston so he could obtain more unemployment compensation than was legally owed, we conclude that White committed the criminal offense of stealing.

We find White violated § 288.380.3 by making false statements to the Division and § 570.030.1 by stealing. He is subject to discipline under § 590.080.1(2).

Summary

There is cause to discipline White's license under § 590.080.1(2).

SO ORDERED on August 26, 2014.

/s/ Karen A. Winn
KAREN A. WINN
Commissioner